Supreme Court, U.S.
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In The
Supreme Court of the United States

BAYOIL SUPPLY & TRADING LTD.,

Petitioner,

vs.

GULF INSURANCE CO., CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41557; LLOYDS OF LONDON SYNDICATES #2724, 0079, 1221, 0002, 1183, 0488, 2488 AND 0079; TERRA NOVA INSURANCE CO. LTD. and CGU INTERNATIONAL INSURANCE PLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Issue 1. The Court of Appeals's opinion eviscerated the plain meaning of the Shortage, Leakage and Contamination Endorsement (App. 21-25), which expands coverage beyond any generally worded boundaries found in the body of the Policy. The Endorsement covers all cargo shortages "howsoever arising."

Issue 2. In any event, there was a sufficient "physical loss" as envisaged by an all-risks marine cargo policy.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the Court of Appeals for the Fifth Circuit are as follows:

Petitioner: **BAYOIL SUPPLY & TRADING LTD.** A company organized and existing under the laws of the Bahamas, with its headquarters at Nassau Bahamas.

Respondents: **GULF INSURANCE CO.**, is a company organized and licensed to conduct insurance business under the laws of the state of Connecticut, with its principal place of business in Hartford, Connecticut. Upon information and belief, the following Respondents are also underwriters, or co-underwriters:

CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41557, which includes LLOYDS OF LONDON SYNDICATES Nos. 2724, 0079, 1221, 0002, 1183, 0488, 2488 and 0079 are a group of insurance syndicates organized and licensed to conduct insurance business under the laws of the United Kingdom with their principal places of business in London, England

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT – Continued

TERRA NOVA INSURANCE CO. LTD. is an insurance company organized and licensed to conduct insurance business under the laws of the United Kingdom with its principal places of business in London, England

CGU INTERNATIONAL INSURANCE PLC is an insurance company organized and licensed to conduct insurance business under the laws of the United Kingdom with its principal places of business in London, England

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

PETITIONER BAYOIL SUPPLY & TRADING LIMITED ("Bayoil") files this Petition for Writ of Certiorari, respectfully showing:

CITATIONS OF OPINIONS AND ORDERS BELOW

1. **Order Granting Appropriate Dispositive Relief**, signed March 26, 2003, by Hon. Samuel B. Kent, United States District Judge for the Southern District of Texas, Galveston Division. App. 10-18.

2. **Final Judgment**, signed July 9, 2003 by Hon. Samuel B. Kent, United States District Judge for the Southern District of Texas, Galveston Division. App. 8-9.

3. **Opinion** of the Court of Appeals for the Fifth Circuit Court of Appeals, signed June 21, 2004. App. 1-7.

4. **Order denying Petition for Rehearing** in the Fifth Circuit Court of Appeals, signed July 21, 2004. App. 19-20.

STATEMENT OF BASIS OF JURISDICTION

Jurisdiction in the U.S. District Court for the Southern District of Texas was predicated on admiralty and maritime jurisdiction under Federal Rule of Civil Procedure 9(h). Jurisdiction in the U.S. Court of Appeals for the Fifth Circuit was predicated on the fact that a Notice of Appeal was timely filed within 30 days of the District Court's rendition of a final appealable judgment on July 9, 2003. App. 8-9. Fed. R. App. P. 4; 28 U.S.C. § 1291.

Jurisdiction in the Supreme Court of the United States is based on the fact that the opinion of the Fifth Circuit Court of Appeals was filed on June 21, 2004 (App. 1-7), and Petitioner timely filed a petition for panel rehearing, which was denied by the panel on July 21, 2004. App. 19-20. The Supreme Court therefore has jurisdiction to review the final judgment of the Court of Appeals by certiorari because this Petition was filed within 90 days of the lower court's denial of a timely filed petition for rehearing. 28 U.S.C. § 1254; Sup. Ct. R. 13(3).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES & REGULATIONS INVOLVED

This case involves the proper interpretation of a maritime all-risk, cargo insurance policy. The policy includes a Shortage, Leakage and Contamination Endorsement, which is reproduced as App. 21-25.

I. Statement of the Case

This is a dispute between an insurance company – Respondent, Gulf Insurance Co. – and its insured – Petitioner, Bayoil Supply & Trading Ltd. – over the insurance coverage afforded under a policy of marine all-risks cargo insurance[1] in connection with Petitioner's claim for a shortage of 48,312 barrels of crude oil. The decision below

[1] Ocean Marine Open Cargo Policy No. SMA4-1131, issued by Respondent Gulf Insurance Co. in favor of Petitioner Bayoil Supply & Trading Ltd.

warrants this Court's review because it is a misapplication of the clear language of the policy itself.

A. Factual Background

The underlying facts are not disputed (see App. 10), and the opinions of the Court of Appeals for the Fifth Circuit issued on June 21, 2004 (App. 1-7) and the District Court (App. 10-18) correctly recite them for purposes of this proceeding. The existence of Ocean Marine Open Cargo Policy No. SM4-1131 ("the Policy"), which includes a Shortage, Leakage and Contamination Endorsement (App. 21-25), is not disputed. The dispute involves the scope of the Policy's coverage in light of the Shortage, Leakage and Contamination Endorsement.

In order to provide a context for this insurance dispute, the following established facts are provided.

Petitioner Bayoil Supply and Trading, Ltd., is in the business of purchasing crude oil abroad, and then shipping it aboard vessels. Respondent Gulf Insurance Co., is a marine insurer that, *inter alia*, issues policies of insurance that cover such cargoes.

On June 8, 2000, the tanker ESSEX was under charter to Petitioner Bayoil, and on that day, loaded a cargo of light crude oil from an oil terminal located in Iraq. The loading was undertaken in accordance with the United Nations "Oil for Food" program. At the time of loading, several inspectors[2] measured the crude oil that

[2] The UN-appointed inspectors, Saybolt International; members of the ESSEX's crew; and Bayoil's (cargo interests') representative, Oil Inspections. App. 2.

was loaded into the ESSEX's individual cargo tanks, and calculated the total amount of cargo on the ship by making calculations based on the ship's tank tables. However, owing to a miscalculation of the capacity of one of the ship's cargo tanks, the amount of cargo stated on the bill of lading was inflated; *i.e.,* the figure reflected the presence of approximately 48,312 barrels of crude oil than were actually present aboard the ESSEX. App. 2-3, 12.

In accordance with the "Oil for Food" program, Bayoil purchased the crude oil from the Iraqi state agency by means of an irrevocable letter of credit. The sales price of the crude oil was set using the cargo quantity that was stated on the face of the bills of lading, as is commercial practice. App. 2-3, 12. Thus, Bayoil paid the Iraqi sellers for approximately 48,312 more barrels of crude oil that were never on board the ESSEX. *Id.*

Sometime after the ESSEX departed Iraq, however, the calculation mistake was realized. Bayoil never received the 48,312 barrels of crude oil that it paid for. App. 2-3.

Accordingly, Bayoil sought coverage of its loss from its cargo insurer, Respondent Gulf Insurance Co., which issued Ocean Marine Open Cargo Policy No. SM4-1131 in favor of its insured, Bayoil. This document is referred to as "the Policy" herein.

The body of the Policy contains a provision which provides, "[t]his insurance covers against all risks of physical loss or of damage to the subject matter insured from any external cause but specifically excluding unexplained shortage and/or unexplained loss in volume." See App. 6. The Policy *also* contains a Shortage, Leakage and Contamination Endorsement ("the Endorsement") which

provides, "this insurance also covers loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) howsoever arising" provided that "there has been full compliance with the following warranties and conditions." App. 5, App. 21. One of the relevant warranties for purposes of this proceeding is section I-2 of the Endorsement, which provides, "**At time of, and during, loading** – warranted that careful measurements as to gauge, weight and temperature of the separate components and the shipment to be made and certified to by a Surveyor . . .". App. 22. Another portion of the Endorsement, section III, reflects that Respondent explicitly agreed to base losses, in certain cases, on bill of lading figures. App. 24.

Bayoil sought recovery from Respondents under the Policy. Respondents declined, however, arguing that no covered loss had occurred and that any loss of cargo could only be measured using a *corrected* cargo survey which was re-calculated after the calculation error came to light. App. 3.

B. Proceedings Below

Bayoil brought a declaratory judgment action in the U.S. District Court for the Southern District of Texas, Galveston Division, seeking a judgment that the loading figure of 48,312 barrels more than the actual load constituted a shortage as defined by the Policy and hence were a covered loss. The issue was presented to the District Court for final resolution by summary judgment. The dispute in the trial court largely focused on which set of figures should be used to calculate a loss – loading figures *versus* post loading figures.

The District Court issued summary judgment for Bayoil on March 26, 2003 (App. 10-18), on the ground that the Endorsement specified that cargo losses were to be measured using loading figures. The District Court correctly concluded that the dispute was resolved by applying the language *of the Endorsement* and its coverage of any loss due to shortage "howsoever arising," given that a proper loading survey had been undertaken. *Id.*

Respondent appealed to the Fifth Circuit Court of Appeals, which in an unpublished opinion dated June 21, 2004, reversed and rendered. App. 1-7. The Court of Appeals based its reversal on the Policy's language that "[t]his insurance covers against all risks of physical loss or of damage to the subject matter insured from any external cause. . . ." App. 6. Relying on this single clause, the Court of Appeals found that the provisions of the Endorsement were, in effect, rendered meaningless as there had been no physical loss as that term was understood by the appellate court. The Court of Appeals also observed that "Bayoil did not physically lose oil but did lose a significant amount of money." App. 5. In the words of the Fifth Circuit Court of Appeals:

> To show coverage . . . Bayoil must prove a physical loss. Because there is no genuine issue of fact as to whether Bayoil actually suffered a physical loss of oil, [Respondents], not Bayoil, are entitled to summary judgment.

App. 6. The Court of Appeals denied Petitioner's petition for rehearing (App. 19-20) and this proceeding follows.

II. Argument & Authorities

The Supreme Court should issue writ of certiorari and review the decision below for the following reasons:

Issue 1. The Court of Appeals's opinion eviscerated the plain meaning of the Shortage, Leakage and Contamination Endorsement (App. 21-25), which expands coverage beyond any generally worded boundaries found in the body of the Policy. The Endorsement covers all cargo shortages "howsoever arising."

The Fifth Circuit Court of Appeals concluded that a party's loss of over $1.5 million worth of cargo – which the party paid for and never received – falls *outside* the coverage of what is unquestionably an all-risks policy of cargo insurance. The rationale for this decision was that coverage was predicated on the existence of a physical loss. App. 6. Significantly, the opinion fails to cite decisional law which predicated a rejection of coverage on a similar application of the concept of physical loss under an all-risks policy. It is widely recognized that all-risks policies provide a broad level of coverage. For example, in *Atlantic Lines Ltd. v. American Motorists Insurance Co.*, 547 F.2d 11 (2d Cir. 1976), the Court of Appeals for the Second Circuit recognized the expansive nature of an all-risks policy of insurance policy, notwithstanding the fact that the policy included a provision that appeared to require a physical loss:

> [T]he policy issued by appellee insured for "physical loss or damage to the property insured from any external cause", except for certain exclusions which are not pertinent to the issues

> herein, and was correctly construed by the District Judge to be an "all risks" policy. The District Judge was also correct in holding that, for recovery under an all risks policy, an insured need demonstrate only that a fortuitous loss has occurred. *Redna Marine Corp. v. Poland*, 46 F.R.D. 81, 86 (S.D.N.Y.1969) . . . . "Indeed, it would appear that all risk insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surrounded the disappearance of property." *Betty v. Liverpool & London & Globe Ins. Co.*, 310 F.2d 308, 311 (4th Cir. 1962).

547 F.2d at 13.

But the Policy at issue here was not simply an *all risks* policy. Rather, it was further endorsed to encompass cargo shortage, leakage and contamination claims *howsoever arising*. The "Shortage, Leakage and Contamination Endorsement", App. 21-25, provides in pertinent part:

> **SHORTAGE, LEAKAGE AND CONTAMINATION ENDORSEMENT**:
>
> THIS INSURANCE ALSO COVERS:
>
> Loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) **howsoever arising**, provided, however, that such claims are payable only in excess of the Deductible Average contained in the Average Terms and Conditions provided herein . . . .

App. 21 (emphasis added).

The Fifth Circuit Court of Appeals essentially drained this Endorsement of meaning, however, by finding that it was to be read in light of the general language about

physical loss found in the body of the Policy. In the words of the appeals court:

> The District Court erred in allowing Bayoil to recover under its policy when Bayoil had not demonstrated that it suffered a physical loss as the policy requires.

App. 5. According to the appeals court, the Endorsement could only apply in the event there had been a physical loss of cargo. *Id.* at 7. The appeals court simply failed to address the issue of the meaning of the terms "howsoever arising."

It is a well-established legal principle that an endorsement to an insurance policy can – and usually does – *enlarge* coverage beyond that afforded in the body of the policy. This is not a radical proposition. *See, e.g., Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 659 (5th Cir. 1999) ("The basic insurance contract between Matador and St. Paul did not include coverage for pollution. The **endorsement provision supplemented the basic agreement and constituted additional bargained for coverage**. An extension of the notice period under the endorsement would expand this coverage and would expose St. Paul to a risk broader than the risk expressly insured against in the policy.") (emphasis added). Thus, the term "howsoever arising" expands the coverage beyond any "physical loss" limit otherwise present.

The Fifth Circuit Court of Appeals did not allow for the fact that the Endorsement expanded coverage to include claims for cargo shortage, leakage and contamination, *howsoever arising*. The plain meaning of the two words "howsoever arising" meant that coverage was

enlarged beyond any notion that losses were limited to physical losses. The methodologies mentioned in the Endorsement confirm this interpretation.

The correct application of a specific endorsement as it relates to an open marine cargo policy is shown by the result reached in *Chemical Bank v. Affiliated FM Insurance Co.*, 815 F.Supp 115, 119-120 (S.D.N.Y. 1993). In *Chemical Bank*, several insured banks brought action against the insurers under open marine cargo policies, seeking to recover for losses they sustained when bills of lading which referred to **coffee that never existed** turned out to be worthless. *Id.* at 116. The putative coffee had been the basis on which the banks had issued extensions of credit. Once in court, the insurer and banks each moved for partial summary judgment arguing that there was no coverage because the cargo did not exist. As noted by the court:

> Affiliated [FM Insurance Co.'s] primary argument is that the core purpose of the policies involved was to **cover physical goods and merchandise** (consisting principally of coffee), against losses on the high seas and related hazards to which shipments of merchandise may be exposed.

815 F.Supp. at 119 (emphasis added). However, the court concluded that because the open marine cargo policy clearly covered a loss that stemmed from the acceptance of fraudulent bills of lading, coverage existed, and the court accordingly entered partial summary judgment in favor of the plaintiffs. *Chemical Bank,* 815 F.Supp. at 118-119, 122. In other words, a specific clause (special condition) of the insurance contract covered fraudulent bills of lading without limiting coverage to physical goods actually in

existence. In *Chemical Bank*, as here, an endorsement was the source of the coverage because it modified any notion of physical loss as mentioned in the body of the policy. In the words of the court:

> Certainly the Affiliated policy was basically intended to provide coverage against injuries caused by loss of goods. **This does not mean that other clauses included in the policy which by their own terms extended beyond this central objective were rendered void.**

815 F.Supp. at 119 (emphasis added).

The Fifth Circuit Court of Appeals erred when it failed to interpret the Endorsement clause separately from the general wording about physical loss found in the body of the Policy. In doing so, the appeals court failed to give effect to the intent of the parties as expressed in the full expression of their contract.

Moreover, the Endorsement contains provisions that are directly relevant to this dispute because they reflect that Respondent explicitly agreed to base losses, in certain cases, using bill of lading figures. The Endorsement provides at Paragraph III (App. 24):

> Where it is standard practice for Bill of Lading figures to be based solely upon ship's figures and/or where a commercial transaction requires Bill of Lading quantities to be based upon ship's figures, Insurers agree to use the Bill of Lading figures so calculated for comparison with discharge figures and the calculation of claims. Bill of Lading figures (as per original or copy of Bill of Lading) so calculated shall be binding on and acceptable to Insurer as proof of shipped quantities.

Here, it is undisputed (and the Court of Appeals found) that Bayoil paid the Iraqi sellers for the crude oil based on the figures stated in the Bills of Lading. App. 2. It is a well-established doctrine of admiralty law that "a bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another." *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841, 845 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986). "It constitutes an acknowledgment by a carrier that it has received the described goods for shipment." *Id.* The *Berisford* court stated that

> the bill of lading . . . has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading thus holds out. . . . The necessity for maintaining the integrity of and confidence in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of COGSA.

Id. at 845. Similarly, representations of *quantity* on the bill of lading constitute equally compelling evidence of a *prima facie* case for cargo loss claims. "[T]he recitation of both number of bundles and weight in the bill of lading furnish . . . *prima facie* proof of receipt by the carrier . . . of both the number and weight recited. . . ." *Spanish Am. Skin Co. v. The Ferngulf,* 242 F.2d 551, 554 (2d Cir. 1957). Given the legal significance of a bill of lading, it is clear that the terms of Paragraph III of the Endorsement are both logical and commercially reasonable. The quantity of cargo that is stated on the face of a bill of lading is legally accepted as final for claims purposes and the Endorsement of the insurance contract at issue so recognizes.

In any event, even if one wished to consider the Endorsement's use of the term "howsoever arising" to be ambiguous, it is a well-established legal principle that ambiguities in marine insurance policies generally should be construed against the insurer and liberally in favor of the insured. *Austin v. Servac Shipping Line*, 794 F.2d 941, 946 (5th Cir. 1988) (maritime law); *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (Texas law of insurance).

As this Court observed more than a century ago when interpreting a maritime contract and discussing the concept of insurable interest, "The court is not at liberty, either to disregard words used by the parties, descriptive of the subject-matter, or of any material incident, or to insert words which the parties have not made use of." *Harrison v. Fortlage*, 161 U.S. 57, 63 (1896). The loss in the case at bar was the type of covered event envisaged by the Shortage, Leakage and Contamination Endorsement. The appellate decision thus frustrates the parties' intentions.

The provisions of the Endorsement make clear that coverage exists under the Policy for this loss given the satisfaction of preconditions. The District Court did not err in finding coverage given these facts, and the opinion of the Court of Appeals should be reviewed by this Court so as to give full effect to the plain meaning of the Endorsement.

Issue 2. In any event, there was a sufficient 'physical loss' as envisaged by an all-risks marine cargo policy.

Even if one sets aside the Endorsement and accepts that a showing of "physical loss" is a prerequisite to coverage under an all-risks policy, there is sufficient physical aspect about this loss so as to not preclude coverage.

It is undeniably true that the 48,312 barrels of crude oil in question were never physically present aboard the tanker ESSEX. At the same time, the argument that this was purely a "theoretical" or "hypothetical" loss is not true. Bayoil suffered a loss of approximately $1.5 million when it discovered that it paid the Iraqi sellers for the 48,312 barrels of crude oil reflected in the Bills of Lading.

What is significant is that Bayoil had an insurable interest in the crude oil which accrued when it paid for the cargo using an irrevocable letter of credit. The Fifth Circuit Court of Appeals's insistence on a showing of physical loss makes little practical sense in these circumstances. As noted by this Court in *Harrison v. Fortlage*:

> It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, **whether he has or has not any title in, or lien upon, or possession of the property itself**. In the present case the plaintiffs in error, under a valid contract in writing, had an insurable interest, by reason of the title which would accrue to them upon arrival and delivery, and of the injury which they might suffer by a previous loss of the goods. *Insurance Co. v. Chase*, 5 Wall. 509, 513;

> *Filley v. Pope*, 115 U. S. 213, 220, 6 Sup. Ct. 19; *Wilson v. Jones*, L. B. 2 Exch. 131, 151; 3 Kent, Comm. 276.

Harrison, 161 U.S. at 63 (emphasis added). Based on the record, the District Court correctly found that a shortage occurred and was covered by the Policy as endorsed. App. 15.

CONCLUSION

Bayoil purchased an all-risks cargo insurance policy and thereafter experienced a cargo shortage of 48,312 barrels of crude oil which it paid for, but never received. Given the "howsoever arising" language of the Shortage, Leakage and Contamination Endorsement, it is immaterial whether Bayoil suffered a physical loss. The Endorsement expressly covers shortages of weight and volume "howsoever arising" and the Endorsement provides a detailed methodology for presenting such claims, including the use of loading figures and bill of lading figures. The provisions of the Endorsement reflect coverage broader than the Policy. Such a result is in keeping with the special nature of a maritime all-risks policy, not to mention the specific language of the Endorsement itself. The proper interpretation of an all risks insurance contract, especially one in the maritime arena, is an issue worthy of this Court's review.

Bayoil experienced a loss and should be thus entitled to coverage under the all-risks policy. For these reasons, this Court should grant writ to review the Fifth Circuit Court of Appeals's opinion, and upon consideration, reverse same and

reinstate the opinion of the District Court or remand the matter for further proceedings.

Respectfully submitted,

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In the
United States Court of Appeals
for the Fifth Circuit

No. 03-41067

BAYOIL SUPPLY & TRADING LIMITED,

Plaintiff-Appellee,

VERSUS

GULF INSURANCE COMPANY, ET AL.,

Defendants,

GULF INSURANCE COMPANY;
CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41557; LLOYDS OF LONDON SYNDICATES #2724, 0079, 1221, 0002, 1183, 0488, 2488, AND 0079;
TERRA NOVA INSURANCE COMPANY, LIMITED;
CGU INTERNATIONAL INSURANCE PLC,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
No. G-02-CV-313

(Filed June 21, 2004)

Before GARWOOD, HIGGINBOTHAM and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

The appealing defendants challenge a summary judgment for plaintiff on its insurance coverage claim.[2] Concluding that the district court erred as a matter of law in interpreting the contract, we reverse and render judgment for appellants.

I.

In 2000, Bayoil Supply and Trading Limited ("Bayoil") purchased oil from Iraq under the United Nation's "Oil for Food" program. The oil was loaded onto Bayoil's ship, the M/T ESSEX. At the time of loading, the United Nations-appointed inspectors (Saybolt International), members of the ESSEX's crew, and Bayoil's representative (Oil Inspections) measured the oil in the ship's tanks and calculated the amount based on the tank tables. This calculation was used on the bill of lading, on the basis of which Bayoil paid Iraq with an irrevocable letter of credit.

Only after leaving port did the Oil Inspections surveyor realize that although the initial measurement had been correct, the amount of oil in one tank had been miscalculated by using the tables for another, larger tank; the actual quantity of oil was some 48,312 barrels less than that stated in the initial calculation and bill of lading. When Bayoil informed Iraq that it had paid for

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[2] The district court granted summary judgment for the defendants on Bayoil's non-contract claims, but Bayoil does not appeal that judgment, which is not before us.

that many barrels that it had not received, Iraq refused to return Bayoil's money, approximately $1.5 million. Bayoil claims this is a loss covered by its "all risks" insurance policy. The defendant underwriters denied coverage.[3]

Bayoil brought a declaratory judgment action, alleging that the 48,312 barrels constituted a "shortage" and was therefore covered under its policy. The district judge personally attempted to mediate, then granted Bayoil's motion for summary judgment, then ordered the parties to further mediation. When this second mediation failed to resolve the dispute, the court entered final judgment for Bayoil.

In the district court, Bayoil claimed that coverage should be based on the erroneous bill of lading pursuant to which Bayoil had paid Iraq. Underwriters maintained that no covered loss had occurred and that any loss should be measured with reference to the corrected survey. The court based its summary judgment on the heading at section I.2 of the Shortage, Leakage and Contamination Endorsement,[4] which the court interpreted to specify that any measurements and corrections must take place at the time of loading, and that the correction made after the

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[3] A comparison of the corrected survey with the survey at the destination showed a shortage in addition to the 48,312 barrels claimed here. Defendants have paid Bayoil's claim for that shortage, which is not disputed here.

[4] This provision reads in relevant part:

> 2. At time of, and during, loading – Warranted that careful measurements as to gauge, weight and temperature of the separable components of th [sic] shipment be made and certified to by a Surveyor, who shall also supervise loading and repeat (and certify to) such measurements as frequently as he deems necessary and desirable. . . .

loading had been completed could not be used to determine whether a shortage had occurred. The court held alternately that if the contract was ambiguous, it was to be construed against the insurer.

II.

We review a summary judgment *de novo*, using the same standards as did the district court. *BP Oil Int'l Ltd. v. Empressa Estatal Petoleos de Ecuador*, 332 F.3d 333, 336 (5th Cir. 2003); *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004). Summary judgment is proper where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Because there are no issues of fact, the resolution of the case turns on an interpretation of the insurance contract as a matter of law.

III.

The insurance contract is to be interpreted in accordance with Texas law. TEXINS. CODE art. 21.42 (1951). "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "To achieve this object the courts will examine and consider the entire writing, seeking as best they can to harmonize and to give effect to all the provisions of the contract so that none will be rendered meaningless." *Universal C. I. T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). With this in mind, we examine the entire contract to determine whether Bayoil's claimed loss falls under the policy's coverage.

A.

Under Texas law, the holder of an all-risk policy has the burden to establish that a covered loss occurred. *See Dow Chem. Co. v. Royal Indem. Co.*, 635 F.2d 379, 386 (5th Cir. Unit A Jan. 1981); *Employers Cas. Co. v. Block*, 744 S.W.2d 940 (Tex. 1988), *overruled on other grounds, State Farm Fire & Cas. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). The district court erred in allowing Bayoil to recover under its policy when Bayoil had not demonstrated that it had suffered a physical loss as the policy requires.

It is undisputed that Bayoil did not physically lose oil but did lose a significant amount of money. Appellants argue that the policy covers only physical loss and that Bayoil's monetary loss therefore does not fall under its coverage. Bayoil, for its part, appears to rely on its characterization of the policy as an "all risk" policy and contends that it has suffered a loss that must be covered.

The title "all risk" is not itself conclusive; rather, we must look to the terms of the policy to determine what risks and losses are covered. The endorsement purports to cover a "loss" resulting from "shortage," and so forth, but does not define what constitutes a shortage or specify whether the "loss" can be economic or must be physical.[5] Because, however, we read the contract as a whole, the

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[5] The endorsement reads in relevant part:

SHORTAGE, LEAKAGE AND CONTAMINATION ENDORSEMENT

THIS INSURANCE ALSO COVERS:

Loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) howsoever arising. . . .

endorsement must be construed in conjunction with the average terms and conditions of the policy.

The body of the contract provides: "This insurance covers against all risks of physical loss or of damage to the subject matter insured from any external cause but specifically excluding unexplained shortage and/or unexplained loss in weight (or volume)." Thus, the contract provides that the required physical loss from an external cause may not consist of or be established merely by an "unexplained shortage." The endorsement provides for an extension of coverage by allowing physical loss to be established by an *unexplained* shortage under the stated circumstances. Here, however, the shortage is *not* unexplained, but is conclusively *explained* as being *not* a physical loss at all, but *only* a calculation error.

To show coverage, therefore, Bayoil must prove a physical loss. Because there is no genuine issue of fact as to whether Bayoil actually suffered a physical loss of oil, appellants, not Bayoil, are entitled to summary judgment.

B.

Because Bayoil cannot demonstrate a covered loss, we need not address whether the district court erred in finding that the magnitude of Bayoil's loss was to be determined on the basis of the initial, incorrect survey calculations. Inasmuch as the district court's finding was based solely on the heading at section I.2 of the endorsement, however, we note that individual headings are not to be considered in isolation from the contract as a whole. Rather, the court must examine the entire document to determine the parties' intent. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

This provision, read in the context of an endorsement to a policy that provides coverage for physical loss evidenced only by an unexplained shortage, can be better interpreted to indicate that the parties intend for an initial survey to provide an accurate account of the amount of oil actually loaded onto a ship, and the parties have made provision to correct inaccuracies in that initial reading. Thus, where the insured admits that no physical loss occurred, the intent of the parties is best fulfilled by using an accurate measurement of the amount of oil it possessed at the time of and during loading.

Using the accurate, corrected measurement of the oil loaded onto the ESSEX demonstrates that Bayoil has been compensated for the shortage that actually occurred between the loading and unloading, and that it is not entitled to coverage for the oil that was never loaded. Thus, it was error for the district court to grant summary judgment for Bayoil on that basis.

For the foregoing reasons, the summary judgment is REVERSED, and judgment is RENDERED for appellants.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

BAYOIL SUPPLY & TRADING LTD. Plaintiff, v. GULF INSURANCE COMPANY, SOUTHERN MARINE & AVIATION UNDERWRITERS, INC., and CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41577 Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. G-02-313

FINAL JUDGMENT

On May 10, 2002, Plaintiff Bayoil Supply & Trading Ltd. ("Plaintiff") filed a declaratory judgment action against Defendants Gulf Insurance Company, Southern Marine & Aviation Underwriters, Inc. ("Southern Marine"), Certain Underwriters at Lloyds, Terra Nova Insurance Company Ltd., and CGU International Insurance Plc. (collectively, "Defendants"). On March 26, 2003, this Court issued its Order Granting Appropriate Dispositive Relief, granting summary judgment in favor of Plaintiff, but dismissing with prejudice Plaintiff's extra-contractual claims as well as Plaintiff's claims against Defendant Southern Marine.

The Parties agree as to the total amount of damages, which is $1,257,186.50; however, under the Policy at issue, Defendants are severally, but *not* jointly, liable. It is therefore **ORDERED** that Plaintiff shall recover as follows from Defendants Gulf Insurance Company; Certain

Underwriters at Lloyds Subscribing T Certificate 41557, specifically including Lloyd's of London Syndicates #2724, 0079, 1221, 0002, 1183, 0488, 2488, and 0079; Terra Nova Insurance Company Ltd.; and CGU International Insurance Plc.:

(1) The amount of Defendants' respective percentages of $1,257,186.50 as appear in the Policy.

(2) Prejudgment interest and post-judgment interest at the legal rate.

The Court directs entry of this Final Judgment. **THIS IS A FINAL JUDGMENT**.

IT IS SO ORDERED.

DONE this 9th day of July 2003, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

BAYOIL SUPPLY & TRADING LTD. Plaintiff, v. GULF INSURANCE COMPANY, SOUTHERN MARINE & AVIATION UNDERWRITERS, INC., and CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41577 Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. G-02-313

ORDER GRANTING APPROPRIATE DISPOSITIVE RELIEF

Plaintiff Bayoil Supply & Trading Ltd. ("Plaintiff") brings this declaratory judgment action against Defendants Gulf Insurance Company, Southern Marine & Aviation Underwriters, Inc. ("Southern Marine"), Certain Underwriters at Lloyds, Terra Nova Insurance Company Ltd., and CGU International Insurance Plc. (collectively, "Defendants"). This dispute involves the interpretation of a marine cargo insurance policy; the facts are largely undisputed, and both Plaintiff (the insured) and Defendants (the insurers) have filed Motions for Summary Judgment. For the reasons articulated below, Plaintiff's Motion for Summary Judgment is **GRANTED**, and Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART.**

I. Summary Judgment Standard

Summary judgment can only be granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). If the evidence is such that a reasonable fact finder could find in favor of the nonmoving party, summary judgment should not be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Dixon v. State Farm Fire & Cas. Co.*, 799 F. Supp. 691, 694 (S.D. Tex. 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513. Procedurally, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2553; *see also* Fed. R. Civ. P. 56(c). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *See Matsushita*, 475 U.S. at 585-87, 106 S. Ct. at 1355-56; *Wise v. E.I. DuPont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). The Court must accept the evidence of the nonmoving party and draw all justifiable inferences in favor of that party. *See Matsushita*, 475 U.S. at 585-87, 106 S. Ct. at 1355-56. However, to meet its burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to

the material facts," but instead, must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 586-87, 106 S. Ct. at 1355-56 (quoting Fed. R. Civ. P. 56(e)).

II. Facts and Legal Analysis

The record reveals the following facts: Plaintiff is the holder of an all-risks marine insurance policy issued by Defendants. In accordance with the United Nations's "Oil for Food" Program, Plaintiff purchased Iraqi oil, which was loaded onto the M/T ESSEX in Iraq on June 8, 2000, United Nations-appointed inspectors (Saybolt International), members of the M/T ESSEX's crew, and Plaintiff's representatives (Oil Inspections) calculated and confirmed the amount of oil loaded onto the ship, which was recorded on the bills of lading. As is customary, Plaintiff paid its suppliers based on this amount. After leaving Iraq, however, Oil Inspections discovered that the initial survey overstated the amount of oil on the ship by 48,312 barrels. Oil Inspections corrected the survey, but not the bills of lading – the basis of Plaintiff's payments to its suppliers; thus, Plaintiff paid for 48,312 barrels of oil that were never loaded onto the ship – an overpayment allegedly in excess of $1.5 million. Plaintiff claims that this loss is covered under its "all-risks" marine cargo insurance policy, which Defendants dispute.

Plaintiff's insurance policy covers "loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) howsoever arising," provided that "there has been full compliance with the following warranties and conditions:"

> **At time of, and during, loading** – Warranted that careful measurements as to gauge, weight and temperature of the separable components of the shipment be made and certified to by a Surveyor, who shall supervise loading and repeat (and certify to) such measurement as frequently as he deems necessary and desirable, and who shall make every effort to use the latest IP/API methods of measurement.

(bold in original). A shortage is measured "by a comparison of[ ] [t]he survey or surveys at points of origin with the survey or surveys made at point of destination, subject always to the deductible. . . . " The Parties disagree about which survey should be compared to the survey at the point of destination: Plaintiff argues that the initial erroneous survey should be compared to the destination survey, revealing a shortage of 62,812 barrels; Defendants argue that the corrected survey should be compared to the destination survey, revealing a shortage of 14,500.[1]

Defendants assert that the corrected survey should be used because the policy clearly contemplates remeasurement and corrections, stating that a surveyor shall make careful measurements "and repeat (and certify to) such measurements as frequently as he deems necessary and desirable." Defendants argue that using the initial survey instead of the corrected survey would render the "repeat (and certify to) such measurements as frequently as he deems necessary and desirable." Defendants argue that using the initial survey instead of the corrected survey would render the "repeat (and certify)" language

[1] Defendants do not dispute coverage for the 14,500-barrel discrepancy between the corrected survey and the destination survey.

meaningless. *See Blaylock v. Am. Guarantee Bank Liab. Ins. Co.*, 632 S.W.2d 719, 722 (Tex. 1982) ("A contract will not be construed so as to render some of its terms meaningless.").[2] Plaintiff responds that if Defendants' argument is correct, then coverage for shortages could become illusory; any measurement revealing a loss could be deemed a "remeasurement." The Court finds Plaintiff's argument more persuasive. Further, the remeasurement clause that Defendants rely on clearly states (in plain language and in bold type) that it applies to remeasurements made "**[a]t time of, and during, loading**. . . . " Defendants' own Motion for Summary Judgment acknowledges that "*after the M/T ESSEX loaded oil in Iraq*, Bayoil's inspectors ([Oil Inspections]) determined that the calculations of oil loaded aboard the vessel were overstated by some 48,312 barrels." (emphasis added). By Defendants' own admission, this correction did not occur, as the policy requires, at the "time of, and during, loading." Thus, the initial survey, which was made at the time contemplated in the policy, should be used to calculate the shortage. *See DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999) (stating that when contract language is clear and definite, a contract is not ambiguous, and the court must apply the plain language as a matter of law; *see also Blaylock*, 632 S.W.2d at 722 ("A contract will not be construed so as to render some of its terms meaningless.").

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[2] "[T]he interpretation of a contract of marine insurance is – in the absence of a specific and controlling federal rule – to be determined by reference to appropriate state law." *Ingersoll-Rand Fin. Corp. v. Employers Ins.*, 771 F.2d 910, 911-12 (5th Cir. 1985) (citing *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310, 312-16, 75 S. Ct. 368, 369-71, 99 L. Ed. 337 (1955)).

The Court notes that ambiguities in insurance policies generally should be construed against the insurer. *See Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (holding that ambiguous policy provisions must be construed strictly against the insurer and liberally in favor of the insured); *see also Austin v. Servac Shipping Line*, 794 F.2d 941, 946 (5th Cir. 1986) (applying, in the context of marine insurance, the "time-honored rule that ambiguities in insurance policies are to be construed against the insurer"). *But see Sharp v. F.S.L.I.C.*, 858 F.2d 1042, 1046 (5th Cir. 1988) (refusing to construe an insurance policy against the insurer because "the contract was in fact a joint effort of both insurers and the insureds," and thus the "principle need not apply"). The Court assumes that Defendants drafted the policy, and thus, following the general rule, would construe any ambiguities against them. However, because the plain language of the policy yields the result reached, the Court need not apply this "time-honored" rule of construction.

For the aforementioned reasons, the Court finds that the initial survey, made *at the time of and during loading*, rather than the corrected survey, made *after the vessel left Iraq*, should be compared to the destination survey to determine whether a shortage occurred. In this case, the record reveals that a shortage occurred. Thus, the Court **GRANTS** Plaintiff's Motion for Summary Judgment, finding that its marine insurance policy covers the disputed 48,312-barrel shortage.

In their Motion for Summary Judgment, Defendants asked this Court to find that Plaintiff's loss was not covered by its insurance policy, which this Court has declined to do. However, Defendants' Motion also asks this

Court (1) to grant summary judgment on Plaintiff's extra-contractual claims, and (2) to dismiss Plaintiff's claims against Southern Marine.

1. Plaintiff's Extra-Contractual Claims

In addition to its declaratory judgment action, Plaintiff brings claims against Defendants under the Texas Insurance Code and the Deceptive Trade Practices Act, as well as claims for fraud, misrepresentation, negligent misrepresentation, negligence, and breach of the duty of good faith and fair dealing. The Court finds that the dispute between Plaintiff and Defendants was a bona fide good faith dispute about coverage under the policy at issue. Thus, the Court finds that Plaintiff's extra-contractual claims are unwarranted. *See U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268-69 (Tex. 1997). Consequently, each and all of such claims are hereby **DISMISSED WITH PREJUDICE**.

2. Plaintiff's Claims Against Southern Marine

Plaintiff includes Southern Marine as a Defendant in this case despite explicit language in the insurance policy stating:

> It is expressly understood and agreed by the Assured by accepting this cover note that Southern Marine & Aviation, Inc. is not and shall not be in any way or to any extent liable for any loss or claim whatever under this cover note. The Insured further understands and agrees that the insurers hereunder are only those individual Insurance Companies or Underwriters whose names or identities are subscribed to this policy as Insurers.

Although any ambiguities in the policy should be resolved in Plaintiff's favor, the Court determines that this clause is not ambiguous: Bayoil agreed that Southern Marine would not be liable on the contract. Where there is no indication of fraud or overreaching by Defendants, Bayoil, a large corporation, represented by counsel, should be held to plainly stated, unambiguous provisions in its insurance policies. *See DeWitt County Elec. Co-op.*, 1 S.W.3d at 100; *see also Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co*, 174 F.3d 653, 659 (5th Cir. 1999) (noting that when transactions involve sophisticated businesses, parties should be held to the specific terms of their bargain). Consequently, each and all of the claims asserted against Southern Marine are hereby **DISMISSED WITH PREJUDICE**.

III. Conclusion

For the reasons stated above, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment, and hereby **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion for Summary Judgment. It is the Court's perception that this Order resolves all the issues involved in this case. However, in an abundance of caution, the Court **ORDERS** the Parties to appear at a status conference on **Friday, April 4, 2003, at 10:00 a.m.,** at which time the Court will set deadlines to provide for the prompt resolution of any remaining claims, including any cross claims or claims for indemnity. As becomes appropriate, the Court will in due course issue a final judgment. Each Party is to bear its own taxable costs and expenses incurred herein to date.

IT IS SO ORDERED.

DONE this 26th day of March, 23, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41067

BAYOIL SUPPLY & TRADING LTD.

Plaintiff-Appellee

v.

GULF INSURANCE CO; ET AL

Defendants

GULF INSURANCE CO; CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41557; LLOYDS OF LONDON SYNDICATES #2724, 0079, 1221, 0002, 1183, 0488, 2488, and 0079; TERRA NOVA INSURANCE COMPANY LIMITED; CGU INTERNATIONAL INSURANCE PLC

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas, Galveston

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ON PETITION FOR REHEARING

(Filed Jul. 21, 2004)

Before GARWOOD, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG-2

(Applicable to Insuring Conditions "A")

SHORTAGE, LEAKAGE AND CONTAMINATION ENDORSEMENT

THIS INSURANCE ALSO COVERS:

Loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) howsoever arising, provided, however, that such claims are payable only in excess of the Deductible Average contained in the Average Terms and Conditions provided herein.

But excluding, nevertheless, the risks of war, strikes, riots, seizure, detention and other risks excluded by the F.C. & S. (Free of Capture & Seizure) Warranty and the S.R. & C.C. (Strikes, Riots and Civil Commotions) Warranty in this policy, excepting to the extent that such risks are specifically covered by endorsement.

I. ***Provided*** there has been full compliance with the following warranties and conditions:

1. (A) In respect of Bulk Crude Oil shipments only:
Prior to loading – warranted that the vessel's cargo tanks and loading facilities be examined and approved by a Surveyor, who shall issue a certificate attesting to the suitability thereof to carry the proposed cargo;

(B) In respect of all other Bulk Liquid shipments:
Prior to loading – warranted that the vessel's cargo tanks and loading facilities be cleaned, examined and approved by a Surveyor, who shall issue a certificate to this effect.

2. **At time of, and during, loading** – Warranted that careful measurements as to gauge, weight and temperature of the separable components of the shipment be made and certified to by a Surveyor, who shall also supervise loading and repeat (and certify to) such measurements as frequently as he deems necessary and desirable, and who shall make every effort to use the latest IP/API methods of measurement.

3. **Prior to, and during, discharge** – Warranted that careful measurements as to gauge, weight and temperature of the separable components of the shipment be made and certified to by a Surveyor, who shall also supervise outturn and repeat (and certify to) such measurements as frequently as he deems necessary and desirable, and who shall make every effort to use the latest IP/API methods of measurement.

4. **Connecting Conveyances** – Warranted that where, by the terms of this insurance, coverage begins in, or continues in, tank trucks, tank cars, tank barges, other tank vessels or pipe lines other than those of the principal carrier, the requirements named herein with respect to cleaning, examining, gauging, weighing, taking of temperature, supervision and certification be applicable as if the connecting conveyance, or pipe line, were the principal carrier.

5. **Warranted free** from claim for rancidity or inherent vice.

6. Warranted all samples which are produced in the course of shipment i.e., shoretank samples, in-line samples, ships samples and discharge port samples shall be secured and retained for 120 days.

7. Notwithstanding the foregoing, Insurer hereby agrees to accept gaugings performed by inspectors appointed and approved by governmental or regulatory authorities.

8. In the event that an approved Loss Control Surveyor is in attendance irrespective of the attendance by (1) an acknowledged independent Surveyor and/or Chemist or (2) by inspectors appointed and approved by governmental or regulatory authorities coverage remains in effect subject to the "Deductible Average Clause" contained in Item 9, Page 4 of Form CAR-000 (1/93).

II. ***Shortage and/or leakage loss*** – if covered hereunder, shall be determined by a comparison of:

The survey or surveys made at points of origin with the survey or surveys made at point of destination, subject always to the deductible, unless such loss is as a result of a peril or perils enumerated herein wherein no deductible shall apply.

Contamination Losses – It is understood and agreed that a loss due to contamination, if covered hereunder, shall be verified by a test or tests made by a chemist, and the measure of loss, based on the findings in such a test or tests, shall be the actual cost of reconditioning (including all expenses incidental thereto), loss of weight, and also depreciation on such portion or portions as cannot reasonably be restored to original condition.

Definition and Fees – It is further understood and agreed that where reference is made to "Surveyor" or "Chemist", such reference shall be deemed qualified by "approved by this Company". All fees, however, shall be at the expense of the insured, except that, in the event of loss, this

Company shall be liable for the cost of surveys and tests necessary to determine the amount of claim hereunder.

III. ***Notwithstanding the foregoing***, in the event the Insured is unable to comply with the aforementioned conditions and/or warranties for any reason or an approved Loss Control Surveyor does not attend the loading, transhipping point, or discharge where a condition and/or warranty is not complied with, coverage shall remain in full force and effect subject to a deductible of .75% or a premium surcharge at 50% of the applicable rate (option to elect either of the aforementioned alternatives shall rest with the Insured). The aforementioned additional deductible of .25% shall not apply to liftings from Kharg Island, Iran.

Where circumstances demand, the findings of Wharfingers and/or Sworn Chemists and/or Customs and/or Shore Installation Superintendents' Certificate(s) at ports of loading and/or discharge shall be accepted as proof of shipped and delivered quantities. However, Insurer hereunder agrees to accept terminal figures of Kharg Island, Lavan Island, Umm Said, Iron Curtain countries and the figures of all terminals which have electric metering as proof of shipped quantities. Where it is standard practice for Bill of Lading figures to be based solely upon ship's figures and/or where a commercial transaction requires Bill of Lading quantities to be based upon ship's figures, Insurers agree to use the Bill of Lading figures so calculated for comparison with discharge figures and the calculation of claims. Bill of Lading figures (as per original or copy of Bill of Lading) so calculated shall be binding on and acceptable to Insurer as proof of shipped quantities.

Claims of leakage and/or shortage and/or difference in weight (or volume) shall be assessed by a comparison of net shipped and net delivered weights or net shipped and net delivered volumes (as specified in the ultimate Contract of Sale relevant to this insurance) ascertained by the foregoing methods, irrespective of the table used, which shall be binding on and accepted by Insurer and the Insured for all purposes.

Where delivery is into automatically measured land tanks where it is not possible for tank figures to be independently checked by Surveyors, the delivered quantities so ascertained shall be binding on Insurer and the Insured.

Should there be no Contract of Sale, claims shall be calculated on the basis of net weight or net volume in accordance with the customs of the trade.

All Other Terms and Conditions Remaining Unchanged.

Attached To and Made a Part of Policy No. SM4-1131

Dated: February 1, 2000

(2)

Supreme Court, U.S.
FILED
DEC 15 2004
OFFICE OF THE CLERK

No. 04-540

IN THE

Supreme Court of the United States

BAYOIL SUPPLY & TRADING LTD.,

Petitioner,

v.

GULF INSURANCE CO; CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41557; LLOYDS OF LONDON SYNDICATES #2724, 0079, 1221, 0002, 1183, 0488, 2488, and 0079; TERRA NOVA INSURANCE COMPANY LIMITED; CGU INTERNATIONAL INSURANCE PLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in applying the laws of Texas to the Policy and its Shortage, Leakage and Contamination endorsement?

2. Did the Court of Appeals err in determining that the Policy covered only physical losses and not financial losses?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Gulf Insurance Company, has the following parent corporation:

> Gulf is a wholly-owned subsidiary of Commercial Insurance Resources, Inc., which is a wholly-owned subsidiary of the Travelers Indemnity Company, which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The St. Paul Travelers Companies, Inc., a public company.

No other publicly-held company owns 10% or more of Gulf's stock.

Respondent, Terra Nova Insurance Co. Ltd., now known as Markel International Insurance Co. Ltd., has the following parent corporation:

> Markel International Ltd., a subsidiary of The Markel Group.

No other publicly-held company owns 10% or more of Terra Nova.

Respondent, CGU International Insurance P.l.c., has the following parent corporation:

> Aviva, P.l.c.

No other publicly-held company owns 10% or more of CGU.

Respondent, Lloyd's Syndicate 0079, has the following corporate participation:

Limit (No. 3) Limited, a subsidiary of QBE Insurance Group Ltd.

No other publicly-held company owns 10% or more of Syndicate 0079.

Respondent, Lloyd's Syndicate 2724, has the following corporate parent:

QBE Corporate Limited, a subsidiary of QBE Insurance Group Ltd.

No other publicly-held company owns 10% or more of Syndicate 2724.

Respondent, Lloyd's Syndicate 2488, has the following corporate parent:

Ace Ltd.

No other publicly-held company owns 10% or more of Syndicate 2488.

The following Lloyd's Syndicates have no corporate parent, nor does any publicly-held company own 10% or more the Syndicate:

Syndicate 0002 a/k/a P.D. Upton & Others

Syndicate 0488 a/k/a J.R. Charman & Others

Syndicate 1183 a/k/a Talbot Syndicate 1183

Syndicate 1221 a/k/a the Millenium Syndicate

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INTRODUCTION

The United States Court of Appeals for the Fifth Circuit interpreted a marine cargo insurance policy in accordance with the body of Texas law which governs commercial insurance policies issued in the State of Texas. No issue of maritime or federal law arose in either the Court of Appeals or the District Court. The Court of Appeals' unpublished decision contains no issues of national or international importance.

Petitioner submits issues of contractual interpretation which do not involve any public policy considerations. Petitioner's stated reason for seeking review by the Court is that the United States Court of Appeals for the Fifth Circuit purportedly misapplied the plain language of the policy. However, the case: 1) presents no departure from the law of Texas; 2) raises no federal, constitutional, statutory, or regulatory issues; 3) does not present a conflict between any Circuit Courts of Appeal; 4) does not involve a departure from the accepted and usual course of judicial proceedings; and 5) does not raise issues of importance except to the parties. Accordingly, there is no reason for the Court to review this case.

STATEMENT OF THE CASE

Respondents rely upon the basic facts of the case as set forth in the Court of Appeals decision (Petition, App. 2-3) as more accurate than Petitioner's statement. In particular, Respondents do not agree with Petitioner's incomplete citations of the language of the insurance policy and the endorsement. For purposes of clarification, Respondents

specify the applicable language of the endorsement (bold type and underlining appear in the original):

SHORTAGE, LEAKAGE AND CONTAMINATION ENDORSEMENT

THIS INSURANCE ALSO COVERS:

Loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) howsoever arising, provided, however, that such claims are payable only in excess of the Deductible Average contained in the Average Terms and Conditions provided herein.

* * *

I. **Provided** there has been full compliance with the following warranties and conditions:

* * *

2. **At time of, and during, loading** – Warranted that careful measurements as to gauge, weight and temperature of the separable components of the shipment be ~~made~~ and certified to by a Surveyor, who shall also supervise loading and *repeat (and certify to) such measurements as frequently as he deems necessary and desirable*, and who shall make every effort to use the latest IP/API methods of measurement.

3. **Prior to, and during, discharge** – [Identical to 2 above, except that "shall also supervise loading" reads "shall also supervise outturn"].

* * *

II. **Shortage and/or leakage losses** – if recovered hereunder, shall be determined by a comparison of:

The survey or surveys made at points of origin with the survey or surveys made at point of destination, subject always to the deductible . . .

III. **Notwithstanding the foregoing**, in the event the Insured is unable to comply with the aforementioned conditions and/or warranties for any reason or an approved Loss Control Surveyor does not attend the loading, transhipping point, or discharge . . . Insurers agree to use the Bill of Lading figures so calculated for comparison with discharge figures and the calculation of claims . . .

(italics supplied)

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit correctly applied Texas law to both the insurance policy and the endorsement.

With respect to marine insurance policies, the Court has long held that in the absence of a controlling federal admiralty law principle, the interpretation of such policies is purely a matter of state law. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 315, *reh'g denied*, 349 U.S. 907 (1955). Petitioner does not contend that any controlling federal admiralty law principle applies in this case, thus the interpretation of the policy is a matter of Texas law. *Id.*

Petitioner's attempt to take the endorsement phrase "however arising" out of context is without foundation under Texas law. Petitioner raised the argument in the District Court, but the District Court rejected that approach; instead, the District Court utilized a section heading in the Endorsement to hold that no corrected survey report could be used (Petition, App. 14). Under Texas law, the Court's primary concern in construing an insurance policy is to "ascertain the true intentions of the parties as expressed in the instrument . . . courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none are rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). More importantly, "no one phrase, sentence, or section of a contract should be isolated from its setting and considered apart from the other provisions." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). Accordingly, the Court of Appeals correctly rejected Petitioner's out-of-context use of "howsoever arising" and the District Court's reliance on the headings of the Endorsement rather than the entire section (Petition, App. 5-7).

Accordingly, after construing the policy as a whole as Texas law requires, the Court of Appeals concluded that the policy required a physical loss and that the endorsement required the calculation of physical losses based on final, corrected survey reports (as the surveyor may "repeat (and certify to) such measurements as frequently as he deems necessary and desirable"). The Fifth Circuit found Petitioner's argument to the contrary to have no merit, and Petitioner has not presented any arguments in the Petition which were not included in the case below. The opinion presents neither a circuit conflict nor a departure from the accepted and usual course of judicial proceedings. Accordingly, there is no reason for the Court to grant up the Petition.

II. The Fifth Circuit correctly determined under Texas law that the policy required a physical loss and did not cover financial losses.

Under Texas law, even under an "all risk" policy of insurance, the insured must first prove "loss or damage to the insured property" before the burden shifts to the insurer to show the loss arose from an excluded cause. *Dow Chem. Co. v. Royal Indem. Co.*, 635 F.2d 379, 386 n.8 (5th Cir. Unit A 1981). Furthermore, even under an "all risk" policy, "once the insurer pleads an exception to coverage, the [insured] retains his usual burden of proving that the cause of the loss is within the coverage of the policy." *Id.*; *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988), *overruled on other grounds*, *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

Read as a whole, the policy provides that the insurance "covers against all risks of physical loss or damage to the

subject matter insured from any external cause but specifically excluding unexplained shortage or unexplained loss in weight (or volume)." The terms of the endorsement do not alter the policy's requirement of physical loss to cover purely economic losses, as the endorsement defines a "loss" as a comparison of "the survey or surveys made at points of origin with the survey or surveys made at point of destination, subject always to the deductible . . ."

The Fifth Circuit found Petitioner's argument to the contrary to have no merit, and Petitioner has not presented any arguments in the Petition which were not included in the case below. The opinion presents neither a circuit conflict nor a departure from the accepted and usual course of judicial proceedings. There is, therefore, no reason for the Court to grant the Petition.

CONCLUSION

Petitioner has identified no basis for the Court to grant certiorari in this matter. Although Petitioner apparently believes (without legal justification) that the Fifth Circuit reached the wrong conclusion, this belief does not qualify Petitioner's case for review by the Supreme Court of the United States. Respondents therefore respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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